STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2003
V LAVONTE R. ARTIS, Defendant-Appellant.	No. 240346 Ingham Circuit Court LC No. 01-077108-FC

Before: Meter, P.J., Talbot, and Borrello, J.J.

PER CURIAM.

Defendant Lavonte R. Artis appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, and felony-firearm, MCL 750.227b. Defendant was sentenced to 240 to 480 months' imprisonment for second-degree murder, 96 to 240 months' imprisonment for each count of assault with intent to commit murder, and 2 years' imprisonment for felony-firearm. We affirm.

Defendant's first issue on appeal is that defense counsel was ineffective for a variety of reasons. First, defendant argues that defense counsel was ineffective for failing to object to the police conducting two photographic showups. We disagree. "A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous." *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Whether a defendant "has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*. We cannot find from the record before us that any error was present.

When a defendant is in custody, he has the right to have defense counsel present at a photographic showup. *People v Doursey Lee*, 391 Mich 618, 624-625; 218 NW2d 655 (1974). However, defense counsel is not required for pre-custody photographic showups, *id*. at 625, except in unusual circumstances. *People v Cotton*, 38 Mich App 763, 769; 197 NW2d 90 (1972). However, the circumstances in this case were not the unusual circumstances referred to in *Cotton*. Defendant was (1) not in custody and (2) had not been identified by any of the victims; therefore, defense counsel was not required to be present at the showups. See *People v Ronald Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000). Because there was no error with the photographic showups, defense counsel was not ineffective for failing to object. See *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Shively*, 230 Mich App 626, 628;

584 NW2d 740 (1998); *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Additionally, contrary to defendant's assertion, the victim had an independent basis for identifying defendant – the victim was looking at defendant when defendant shot him in the face. See *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

Next, defendant argues the prosecutor failed to list res gestae witnesses on its witness list, and defense counsel was ineffective for failing to object, or presumably in the alternative, failing to seek assistance to locate these witnesses. Defendant also argues that counsel was ineffective for failing to request a missing witness jury instruction. We disagree.

"A res gestae witness is a person who witnesses 'some event in the continuum of a criminal transaction' and whose testimony will 'aid in developing a full disclosure of the facts.'" *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989), citation omitted. A prosecutor must notify the defendant of all known res gestae witnesses, *People v Burwick*, 450 Mich 281, 288-289, 292; 537 NW2d 813 (1995), and provide reasonable assistance to locate witnesses at the defendant's request. *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998); MCL 767.40a. In this case, the record is clear that the witnesses complained of were known mostly by street names, thereby hampering the State in its efforts to find the witnesses.

The failure to call supporting witnesses does not inherently amount to ineffective assistance of counsel, *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996), and the failure to present witnesses is acceptable trial strategy. *Calhoun*, *supra* at 524. While the prosecutor did not list the witnesses on the witness list, defendant knew that the witnesses existed because their names and their purported relationship to the events were part of the preliminary examination testimony.

Trial counsel is strongly presumed to have acted for reasons that fall "within the wide range of reasonable professional assistance." *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In this case, during closing argument, defense counsel commented that the missing witnesses had not been heard from. Defense counsel's decision not to request assistance in locating the witnesses or request the missing witness jury instruction appears to be a strategic decision. By not requesting assistance in finding the witnesses, and the witnesses therefore not being present, defense counsel could point out that all witnesses had not been heard from by the prosecutor; thereby casting doubt on the prosecutor's evidence absent the risk that the witnesses would confirm that defendant was the shooter. Therefore, defense counsel was not ineffective. See *Pickens*, *supra* at 303; *Shively*, *supra* at 628; *Knapp*, *supra* at 387; cf *People v Bass*, 247 Mich App 385, 391; 636 NW2d 781 (2001).

Defendant also contends defense counsel was ineffective because he did not investigate defendant's alibi and unreasonably urged him to abandon his alibi defense. We disagree.

Generally, the decision to seek the presence of alibi witnesses is a matter of trial strategy. *People v Stevenson*, 60 Mich App 614, 618; 231 NW2d 476 (1975). Defense counsel investigated defendant's alibi, talked to at least one of the witnesses, and discussed the matter with defendant and defendant's family. Defense counsel was not ineffective for failing to call alibi witnesses who would contradict the theory the defense was putting forth. Presenting the jury with two opposite and inconsistent theories of the crime – that defendant was not present at the scene of the shooting and that he was present at the scene of the shooting, but he was not the

shooter – would only have likely caused the jury to discount all testimony related to defendant's innocence. Therefore, defense counsel was not ineffective. See *Pickens*, *supra* at 303; *Shively*, *supra* at 628; *Knapp*, *supra* at 387; cf *Stevenson*, *supra* at 618.

Defendant next suggests the trial court improperly allowed the prosecutor to use an alleged co-defendant's guilty plea transcripts to refresh the co-defendant's memory. We disagree. Evidentiary objections are within the trial court's discretion, and the trial court's decision is reviewed for an abuse of discretion. *People v Furman*, 158 Mich App 302, 326; 404 NW2d 246 (1987).

A writing or object can be used to refresh a witness' memory while the witness is testifying. MRE 612(a). In this case, the witness consistently stated that he did not remember the specifics of the shooting because it was a long time ago. Therefore, attempting to refresh the witness' memory with reference to his guilty plea was not more prejudicial than probative. See MRE 403. The witness admitted he was the other shooter in the car and said he remembered making the plea and did not dispute anything he said during the plea. It was reasonable for the prosecutor to attempt to refresh the witness' memory.

Defendant also contends the prosecutor committed a *Brady*[1] discovery violation. We disagree. Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

"A criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). "This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt." *Id*. Impeachment evidence and exculpatory evidence fall within this rule because, if disclosed and used effectively, the evidence may make the difference between conviction and acquittal. *Id*. In this case, defense counsel cross-examined the disputed witness about a letter the witness sent in which he discussed a plan to extort money from defendant for favorable testimony. There is no indication that the timing of the prosecutor's disclosure of the letter resulted in a *Brady* violation. Further, trial testimony indicates defense counsel was aware of the criminal histories of two of the witnesses. *Lester*, *supra* at 281-282.

Defendant also claims the trial court erred in allowing evidence that a witness had been threatened. We disagree. Generally, all relevant evidence is admissible. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Relevant evidence is evidence that is material and probative, meaning that the evidence is logically relevant to, and has any tendency to prove, an issue or fact of consequence at trial. *Starr*, *supra* at 497-498. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403. All evidence is prejudicial, but relevant evidence should only be excluded when unfair prejudice substantially outweighs the probative value. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995).

[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

In this case, the probative value of the witness's testimony was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See *People v Watson*, 245 Mich App 572, 581; 629 NW2d 411 (2001); *Doursey Lee*, *supra* at 642. The witness' testimony was relevant to allow the jury to weigh her testimony that she did not remember certain events related to the shooting and why she did not want to testify.

Next, defendant argues the trial court improperly limited cross-examination of a witness and gave an inadequate jury instruction, and that defense counsel was ineffective for not objecting to the inadequate jury instruction given. We disagree. Whether a trial court properly limited cross-examination is reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995).

"Cross-examination is arguably the most effective, and sometimes the only, tool a defendant has to defend against the charges brought against him." *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990). "A witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *Minor*, *supra* at 685. In this case, defendant was allowed to effectively cross-examine the witness about his agreement with the prosecutor. What defendant was prevented from doing, however, was casting doubt about whether it was wise for the witness to testify without a written grant of immunity. Further, the jury was provided with adequate jury instructions that related to the witness; therefore, defense counsel was not ineffective for failing to object. See *Pickens*, *supra* at 330; *LeBlanc*, *supra* at 582.

Finally, defendant claims the cumulative effect of repeated instances of misconduct and errors denied him a fair and impartial jury trial. We disagree because this Court finds defendant has shown no errors. See *People v Rodriguez*, 251 Mich App 10, 37; 650 NW2d 96 (2002).

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello